

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of September, two thousand and six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. DENNIS JACOBS,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Donate Luyombya Musenge,

Petitioner,

-v.-

Nos. 04-2918-ag (L);
05-1624-ag (Con)
NAC

Bureau of Citizenship and Immigration Services,

Respondent.

FOR PETITIONER: Theodore N. Cox, New York, New York.

FOR RESPONDENT: H.S. Garcia, United States Attorney, Nelson Pérez-Sosa, German A. Rieckehoff, Assistant United States Attorneys, San Juan, Puerto Rico.

1 UPON DUE CONSIDERATION of this petition for review of the Board of Immigration
2 Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the
3 petition for review is GRANTED, the BIA's order is VACATED, and the case is REMANDED
4 for further proceedings consistent with this decision. The petition for review of the BIA's March
5 2005 decision denying the motion to reopen is DISMISSED as moot.

6 Donate Luyombya Musenge petitions for review of the May 2004 BIA decision affirming
7 the decision of Immigration Judge ("IJ") Michael Rocco, denying Musenge's applications for
8 asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). We
9 assume the parties' familiarity with the underlying facts and procedural history.

10 Where the BIA affirms summarily, this Court reviews the IJ's decision as the final agency
11 determination. *See, e.g., Twum v. INS*, 411 F.3d 54, 58 (2d Cir. 2005). This Court reviews the
12 agency's factual findings, including adverse credibility determinations, under the substantial
13 evidence standard, treating them as "conclusive unless any reasonable adjudicator would be
14 compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v.*
15 *INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004). Nonetheless, "the fact that the [agency] has relied
16 primarily on credibility grounds in dismissing an asylum application cannot insulate the decision
17 from review." *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). An adverse
18 credibility determination must be based on "specific, cogent reasons" that "bear a legitimate
19 nexus" to the finding. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

20 The adverse credibility finding rested on three bases: (1) petitioner's inconsistency over
21 whether he was wearing clothes while fording a river to escape capture, (2) the implausibility that
22 petitioner kept his identification card dry or intact throughout his escape, and (3) a contradiction

1 in dates between petitioner's testimony and a document entitled "Attestation of Marriage." The
2 first two grounds were unreasonable bases for the adverse credibility finding: (1) Musenge had
3 consistently stated that he wore shorts while crossing the river (describing his outfit as "no
4 clothes . . . shorts only"); and (2) the assumption that the identification card would have been
5 visibly damaged by the water is based on pure speculation. The third basis for the adverse
6 credibility finding, however, is supported by the record: Petitioner claimed to request the
7 marriage certificate in November 1996, while the document reflects issuance in August 1996.
8 This inconsistency is serious, and goes to the heart of petitioner's claim: Petitioner repeatedly
9 claimed to have been imprisoned for eight months, and only thereafter to have requested a copy
10 of his marriage certificate. The issuance of this document three months before the end of
11 petitioner's purported jail time undermines his claim to ever have been imprisoned. Upon a
12 combination of erroneous and error-free findings, we ask whether "we can state with confidence
13 that the IJ would adhere to his decision were the petition remanded." *Xiao Ji Chen v. United*
14 *States Dep't of Justice*, 434 F.3d 144, 161 (2d Cir. 2006). We cannot so state with confidence,
15 but a remand to the IJ may be obviated depending on the BIA's clarification of an issue of law.

16 **Protected Ground**

17 To be eligible for asylum as a refugee under the INA, an applicant must demonstrate an
18 inability or unwillingness to return to his home country "because of persecution or a well-
19 founded fear of persecution on account of race, religion, nationality, membership in a particular
20 social group, or [as Musenge claims] *political opinion*." 8 U.S.C. § 1101(a)(42) (emphasis
21 added). The BIA has held that an applicant must produce either direct or circumstantial evidence
22 from which it is reasonable to conclude that the harm suffered or feared by the applicant is

1 motivated, at least in part, by an actual or imputed ground. *Matter of S-P-*, 21 I. & N. Dec. 486,
2 494 (BIA 1996). Here, petitioner presented testimony that -- if credible -- would tend to show
3 that petitioner was persecuted because of political opinions of his family members. The
4 interrogation described by petitioner reflects a concern with the whereabouts and opinions of
5 petitioner's brothers and father, but reflects no interest in petitioner's own political opinions. *See*
6 Appx. at 169 ("They . . . started to telling me that . . . we don't trust you, and your father and your
7 brother is working for the government, so you're going to tell us the truth. *Where is your*
8 *brothers?*" (emphasis added)); Appx. at 174 ("They were asking me [because] . . . my brother is
9 a soldier, I know, *so I know the secrets* of [Mobutu]." (emphasis added)). All of these lines of
10 inquiry stress concern with petitioner's family, without focus on petitioner's actual or imputed
11 beliefs.

12 This narrative raises a novel question: whether an applicant who is persecuted because of
13 the political opinions of close relatives -- or, in an effort to inflict persecution on those close
14 relatives -- can claim asylum on the basis of persecution for political opinion, absent evidence of
15 persecution on the basis of petitioner's own actual or imputed political beliefs. In other words, is
16 asylum available to an applicant who suffers persecution brought about by the political opinions
17 of another, even if those opinions are not imputed to the applicant?

18 This issue raises a question of statutory construction: whether the persecution allegedly
19 suffered was motivated by "political opinion" per the meaning of the statute. "Where (as here)
20 the BIA has yet to decide whether a group, a thing, or a situation falls within the ambit of a
21 statutory term, the proper course is for the reviewing court to remand the matter to the BIA in

1 accordance with the well-worn ordinary remand rule." *Ucelo-Gomez v. Gonzales*, 448 F.3d 180,
2 186 (2d Cir. 2006). We therefore vacate and remand to the BIA for consideration of this issue.

3 For the foregoing reasons, the petition for review is GRANTED, the BIA's May 2004
4 order is VACATED, and the case is REMANDED to the BIA for further proceedings consistent
5 with this decision, including (if necessary) remand to the IJ for further fact-finding. The petition
6 for review of the BIA's March 2005 decision is DISMISSED as moot. Having completed our
7 review, any stay of removal that the Court previously granted in this petition is VACATED, and
8 any pending motion for a stay of removal in this petition is DENIED as moot. Any pending
9 request for oral argument in this petition is DENIED in accordance with Federal Rule of
10 Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____